SUPREME COURT, U. S.

SEP 4 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-406

KEVIN BURNS, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and

ALVA C. EDWARDS, Director of Clayton County Department of Social Services,

Petitioners,

v.

JANE DOE, Individually and on behalf of her minor child, JENNIFER, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

KEVIN BURNS, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and

ALVA C. EDWARDS, Director of Clayton County Department of Social Services,

Petitioners,

v.

JANE DOE, Individually and on behalf of her minor child, JENNIFER, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Kevin Burns, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and Alva C. Edwards, Director of Clayton County Department of Social Services, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 6, 1973.

OPINION BELOW

Since the Opinion of the Court of Appeals has not as yet been published, it appears in the Appendix hereto.

JURISDICTION

On the 6th day of June, 1973, the Court of Appeals for the Eighth Circuit filed its Opinion, Decision and Judgment. The Court denied Petitioners' Motion for Rehearing on the 17th day of July, 1973, and entered an Order recalling the Mandate on August 8, 1973, copy of which also appears in the Appendix attached hereto. As noted from the latter Order, Petitioners were granted a thirty-day Stay of issuance of the mandate "if within said period of thirty days there is filed with the clerk of this court [Circuit Court of Appeals] a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed . . . ".

QUESTIONS PRESENTED

I. Whether a state can grant an ADC (AFDC) grant which includes only the needs of a minor child when the mother refuses to assist the State in its efforts "to establish the paternity of such child and secure support for him" pursuant to Title 42 U.S.C. §602(a) (17) (A) (i);

II. In view of the Eleventh Amendment to the United States Constitution whether a Federal Court can order the State to pay retroactive welfare payments from its treasury when:

(1) the court enunciates a new principle of substantive law or decides an issue of first impression whose resolution was not clearly foreshadowed;

and/or

(2) when a department of the executive branch (not the General Assembly) provides for retroactive payments relating solely to administrative fair hearings before the State Agency.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

DIVISION I

Title 42 U.S.C. §602(a) (17) (A) (i):

> "Sec. 602.(a) A State plan, for aid and services to needy families with children must . . . (17) provide --
> "(A) for the development and implementation of a program under which the State agency will undertake --
> "(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, . . . "

[STATUTES AND REGULATIONS APPEAR IN APPENDIX C]

DIVISION II

Eleventh Amendment to the United States Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

[STATUTES AND REGULATIONS APPEAR IN APPENDIX C]

STATEMENT OF THE CASE

The Plaintiff below, representing herself and her child in a class action, sought a declaratory judgment that a portion of § 239.5, 1971 Code of Iowa, as interpreted, and regulations V-5-56 and V-5-57 of the State of Iowa, Department of Social Services Employees' Manual, which require an ADC recipient to cooperate in legal actions and other efforts to obtain support for the child are void and invalid as conflicting with the Social Security Act of 1935. They also alleged violations of Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The District Court found it unnecessary to reach the Constitutional issues.

The United States District Court for the Northern District of Iowa convened a three-judge panel which then remanded to the single judge of the Northern District, Honorable Edward McManus. Judge McManus found that § 239.5, 1971 Code of Iowa, as interpreted, was in conflict with the Social Security Act of 1935 in that it imposes a requirement of eligibility in addition to need and dependency. That section of the Code of Iowa was declared void in so far as it makes cooperation in a paternity action a condition of eligibility for ADC and the defendants were permanently enjoined from denying assistance to otherwise eligible individuals on the basis of § 239.5 or regulations relating thereto.

The District Court, after finding a proper class action existed, ordered Commissioner Gillman to make payments forthwith to all individuals in the class to whom aid was refused during the 2-year period proceeding the date of the decree.

On August 14, 1971, the named Plaintiff gave birth to a child out of wedlock. The plaintiff's application for ADC assistance was approved by the Clayton County, Iowa, Board of Social Welfare on September 3, 1971, the grant being in the amount of $151.00. On September 27, 1971, the Plaintiff was referred to the Clayton County Attorney as required by § 239.5, 1971 Code of Iowa.

The Plaintiff revealed the name of the father of the child to the Clayton County Attorney but stated that she would not participate in a paternity suit against the alleged father. On December 7, 1971, the Plaintiff was notified by the Clayton County Board of Social Services that the ADC grant was being terminated, due to her failure to cooperate in a paternity action.

The Plaintiff appealed this decision to the Commissioner of Social Services and on May 1, 1972, following an appeal hearing, the Commissioner, James Gillman, sent the Plaintiff a notice of decision affirming the termination of ADC. The Plaintiff received her last ADC payment as of June 1, 1972.

On June 16, 1972, the Clayton County Board of Social Welfare acting upon the same application re-opened the case and made a determination that the child of Jane Doe was needy and dependent and that an ADC grant should be made for the needs of said child only, payable through a conservator-payee. It also provided that, pending the appointment of a conservator-payee, County Relief funds (pursuant to Chapter 252, 1971 Code of Iowa) should be granted in the same amount as an ADC grant for one person, $75.00, to a third party for the support of the child.

The Circuit Court in its Decision and Judgment held Iowa's Statute, Section 239.5, Code of Iowa, 1973, "wholly unenforceable" as being in contravention of the Social Security Act since it "lessens the benefits flowing to the dependent child".

The Court, therefore, ordered retroactive payments to Plaintiff [Respondent] and the class she represents based upon the Departmental Rule and Regulation applicable solely to agency actions in "administrative fair hearings".

REASONS FOR GRANTING THE WRIT

WITHOUT INTERVENTION BY THIS HONORABLE COURT, (1) WELFARE OFFICIALS IN IOWA AND OTHER STATES RISK CONTEMPT ACTIONS IN IMPLEMENTING A NEW REGULATION OF HEW, AND (2) CONTRARY TO THE ELEVENTH AMENDMENT RIGHTS, IOWA AND OTHER STATES FACE ORDERS FOR RETROACTIVE WELFARE PAYMENTS FROM STATE FUNDS WHERE A FEDERAL COURT ENUNCIATES NEW SUBSTANTIVE LAW.

DIVISION I

A STATE HAS THE RIGHT TO GRANT AFDC ASSISTANCE SOLELY TO A CHILD, FIXING A DOLLAR AMOUNT WHICH OMITS AN ALLOWANCE FOR A MOTHER FAILING TO COOPERATE WITH THE STATE IN SEEKING CHILD SUPPORT FROM THE FATHER

Probably no area of the Social Security Act is presently in more quandry nationwide than the one brought to the attention of this Court in this Petition.

Effective July 1, 1968, Congress in P.L. 90-248 required each State to develop and implement a program under which State agency:

> "will undertake -- (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him," [42 US.C. 602 (a) (17) (A) (i)].

Following the Congressional mandate, States have been wrestling with compliance problems. The States of Connecticut, Oregon, California, and Illinois sought to deny an AFDC grant altogether. By

divided courts, this procedure was held to violate the Social Security Act in *Doe v. Shapiro*, 302 F Supp. 761 (D. Conn. 1969) appeal dismissed for late filing (over strenuous dissent of two Justices), 396 U.S. 488 (1970); *Myers v. Juras*, 327 F. Supp. 762, (D. Oregon), *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971), aff'd sub nom, *Carleson v. Taylor*, 404 U.S. 980; *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971) aff'd as *Weaver v. Doe*, 404 U.S. 987.

Other States, Pennsylvania, Connecticut, New York, and Iowa sought a different approach.

Those states provided for an immediate grant to the child in an amount covering a single grant and seeking cooperation of the mother in establishing paternity of the child to secure support for the child.

This too has resulted in litigation, not only this case, *Doe v. Gillman* (now *Burns v. Doe*) but also *Lavine v. Shirley*, 409 U.S. 1053 (1972) remanded to the three-judge panel in the District Court in New York and two earlier cases, *Wood v. Miller*, 318 F. Supp. 510 (W.D. Penn 1970) (not appealed) and *Doe v. Harder*, 310 F. Supp. 302 (D. Conn. 1970), appeal dismissed "for want of jurisdiction", 339 U.S. 902.

HEW sought to solve the problem by Regulation[1] but that Regulation is new and may be subject to future litigation.

[1] Between publication of the proposed regulation on December 19, 1972 in 37 F.R. 27637 and the final publication in 38 F.R. No. 85 page 10940 on May 3, 1973, the public records show that numerous States filed protests and comments on the proposed regulation. HEW, in view of these comments and the remand in *Lavine*, added the underscored clause to its proposed Regulation: Title 45 C.F.R. §233.90 (4):

> "(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist:
>
> "(i) in the establishment of paternity of a child born out of wedlock: or
>
> "(ii) in seeding support from a person having a legal duty to support the child; *but neither this nor any other provision of these regulations should be construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.*"

In at least Iowa and some of the other States, there are injunctions against the States in spite of the Regulation.

The Court has consistently recognized the long standing HEW regulation §233.10 (a) (1) (i) reading "States have substantial latitude" for coverage, nature and scope of their public assistance programs and:

> "The public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. However, it may not impose any eligibility condition that is prohibited under the Social Security Act."

In the recent decision of this court decided June 21, 1973, in *New York State Department of Social Services, et al., v. Dublino, et al.*, 41 U.S.L.W. 5047, at page 5049 we read:

> "This Court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them . . .
>
> "This same principle relates directly to state AFDC programs, where the Court already has acknowledged that States "have considerable latitude in allocating their AFDC resources, since each State is free to set its own standards of need and to determine the level of benefits by the amounts of funds it devotes to the program." *King v. Smith, supra*, at 318-319; *Dandridge v. Williams, supra*, at 478; *Jefferson v. Hackney, supra*, at 541.

In *Dublino* this Court also stated at page 5052:

> "In this context, the dissenting opinion's reliance on *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972), and *King v. Smith, supra*, is misplaced. In those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act expressly provided would be eligible."

In *Rosado v. Wyman*, 397 U.S. 397 (1970), at page 408 we read:

> "There are two basic factors that enter into the determination of what AFDC benefits will be paid. First, it is necessary to establish a "standard of need", a yardstick for measuring who is eligible for public assistance. Second, it must be decided how much assistance will be given, that is, what "level of benefits" will be paid. On both scores Congress has always left to the States a great deal of discretion. *King v. Smith*, 392 U.S. at 318."

An examination of the express language employed by Congress in several different places in the Social Security Act gives support to the State's contention that in not all cases need a relative be included in an AFDC grant, i.e., the child can be the single beneficiary of an AFDC grant.

Title 42 U.S.C. 602 provides in part:

"Sec. 602(a) A State plan for aid and services to needy families with children must . . .

> (4) Provide for granting an opportunity for a fair hearings before the State agency to *any* individual whose claim for aid to families with dependent children is denied . . .
>
> (7) . . . the State agency shall, in determining need, take into consideration of any other income and resources of any child *or relative* claiming aid to families with dependent children . . .
>
> (11) . . . provide for prompt notice to appropriate law enforcement officials of the furnishing of *aid to families with dependent children in respect of a child* who has been deserted or abandoned by a parent;
>
> (14) . . . provide for the development and application of a program for such family services . . . for *each* child and relative who receives aid to families with dependent children . . .

(15) . . . provide -- (A) for the development of a program for *each* appropriate relative and dependent child receiving aid under the plan . . .

(17) provide -- (A) for the development and implementation of a program under which the State agency will undertake -- (i) in the case of a *child* born out of wedlock *who is receiving aid to families with dependent children*, to establish the paternity of such child and secure support for him, . . ."

(Emphasis Supplied)

In spite of the previous pronouncements of this court, and the statutory language referred to above, the court of Appeals in this case turned its decision upon the ground that the State would be "lessening its benefits" under the AFDC grant. The dollar amount of benefit is not an issue for the Courts. The issue is whether any reasonable amount was paid to the child under an AFDC grant. As stated in *Dandridge* at page 478, we read:

> "As we have noted, the practical effect of the Maryland regulation is that all children, even in very large families, do receive some aid. We find nothing in 42 U.S.C. §602 (a) (10) that requires more than this."

The child here, Jennifer Doe, was granted the same dollar amount in her ADC grant which other Iowa children, who, for any other reason, were receiving single grants.

We think it unreasonable to presume that Congress intended a State to be required to establish paternity and provide support by one legally liable for a child receiving ADC and at the same time deny the State the only effective remedy -- namely remove the needs of the mother from the welfare grant until she cooperates with the State in its effort to comply with the Act.[2]

[2] Appearing before the County Attorney, furnishing information as to identity and whereabouts of the father and a willingness to cooperate with the county attorney in efforts to enlist his help with the support of the child is all that is required for a mother to be included in the grant. Actual receipt of child-support payments is not required. (§239.5, 1973 Code of Iowa as construed by O A G, August 5, 1957.)

Surely Congress did not intend in one breath to require a State to perform a task and in the next to strip the State of an effective means of doing so.

DIVISION II

THE ELEVENTH AMENDMENT ARGUMENT

There exists an unresolved conflict among Federal Courts as to the applicability of the Eleventh Amendment in the welfare area which only this Court can settle.

The Court of Appeals in this case referred to *Rothstein v. Wyman*, 467 F.2d 226 (CA 2, 1972) [wherein certiorari was denied, 41 Law Week 3527 (Docket No. 72-5831)], saying:

> "the Second Circuit rules that retroactive payments were violations of the Eleventh Amendment, *absent* the state's consent, because they create a liability which must be met by public funds. Id, at 236-242. But see *Jordan v. Weaver*, 472 F.2d 985 (7 Cir. 1973) and *McDonald v. Department of Public Welfare of the State of Florida*, 430 F.2d 1268 (5 Cir. 1970)".

Since the filing of this opinion, this Court has granted the petition for a writ of certiorari in the above-cited *Jordan* cases.[3]

The instant case, however, presents two facets, at least one of which, was not before the Courts in either *Rothstein* nor *Jordan* (now *Edelman*): first, "a new principle of substantive law was enunciated" by the Circuit Court here as well as "deciding an issue of first impression whose resolution was not clearly foreshadowed;" and second, the Court in this case held that the administrative agency, in

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[3] *Jordan v. Weaver*, now known as *Edelman v. Jordan*, Docket No. 72-1410, Writ of Certiorari granted June 11, 1973.

adopting the Departmental Rule [4] relating solely to the administrative fair hearings, served to waive the Eleventh Amendment rights for the State of Iowa.

Certainly the decision and judgment in the case at hand, "establish[es] a new principle of law" and "decid[es] an issue of first impression"; these meet the tests preventing retroactive effect if the judgment on the substantive law be correct. *Chevron Oil Co. v Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971).

The second distinguishing feature of this case between *Rothstein* and *Edelman* is that the Circuit Court here did not meet the Eleventh Amendment argument directly. Instead, it turned its opinion upon unargued local Department Regulations promulgated pursuant to Chapter 17A, Code of Iowa, 1973. The Court failed to consider the Iowa statute which prevents those Rules and Regulations from being construed as actions of the Iowa General Assembly. The pertinent part of Section 17A.11 "Rule of construction", reads in part:

> "...any action or inaction by the departmental rules review committee on any rule, or any inaction by the general assembly on any rule, shall not be construed as approval or enactment of any rule by the general assembly."

Summarizing, what the Circuit Court here did was to hold that a State Department, being the executive branch of government, by its Rule and Regulation could waive the Eleventh Amendment rights for the State. This is entirely contrary to *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 463, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945), cited by *Rothstein* in support of its statement that a State could consent to waiver of the Eleventh

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[4] Iowa Departmental Rules governing fair hearings, § 53.16 (217), 1973 I.D.R., p. 1026, and Employees' Manual on Appeals and Fair Hearings, VI-13-2.

Amendment. In *Ford Motor Company* this Court (Supreme Court of the United States) held that under the Indiana Constitution only its legislature, and not an official of the executive branch of government, could waive State's rights. Likewise, the Iowa statute does not permit state agencies to exercise the powers of the General Assembly to give consent to waive the Eleventh Amendment rights of the State of Iowa.

Undoubtedly most, if not all, states will have a concern if the Departmental Rule and Regulation relating to "fair hearings" in the administrative process can be applied by a Federal Court in ordering retroactive payments in any legal action which holds the State statutes invalid for the Social Security Act demands that all states have administrative fair hearings [Title 42 U.S.C. § 602(a) (4)]. Obviously the Iowa Department of Social Services was not intending to act for the General Assembly and waive any Eleventh Amendment rights of the states in court litigation. That is the sole prerogative of the General Assembly. All the Iowa Department did was to enact Rules and Regulations governing its own administrative hearings pursuant to § 205.10(a) (13) C.F.R., but the Circuit Court here misapplied the same.

CONCLUSION

Since only the voice of this Court can (1) resolve the confusion of the States seeking an available effective form in complying with the Social Security Act and (2) decide for all the States if an executive agency, without legislative authority, can waive the Eleventh Amendment rights for that State and if Federal Court in conjunction with enunciating a new principle of substantive law can authorize retroactive payments from State funds.

We, therefore, respectfully request this Court to issue a Writ of Certiorrari to review the Decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

August 31, 1973

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1605

Jane Doe, Individually and on Behalf of Her Minor Child, Jennifer, and on Behalf of All Others Similarly Situated,
Appellees,

v.

James N. Gillman, Commissioner, State of Iowa, Department of Social Services, and Alva C. Edwards, Director of Clayton County Department of Social Services,
Appellants.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: February 16, 1973.
Filed: June 6, 1973.

Before LAY and ROSS, Circuit Judges, and NICHOL,* District Judge.

LAY, Circuit Judge.

Section 239.5 of the Iowa Code Ann. (1972) provides, *inter alia*:

* The Honorable Fred J. Nichol, Chief Judge of the United States District Court, District of South Dakota, sitting by designation.

> "No payment for aid to dependent children shall be made unless and until the county board of social welfare, with the advice of the county attorney shall certify that the parent receiving the aid for the children is co-operating in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

The plaintiff brought this class suit individually and on behalf of her minor daughter and all others similarly situated challenging the Iowa law as being violative of the Social Security Act of 1935 and its regulations which provide aid to families with dependent children (AFDC). See 42 U.S.C. §§ 601-610. Consistent with several decisions by three-judge courts[1] the district court found the quoted portion of Section 239.5 to be inconsistent with and in violation of federal law in that it imposes a requirement for eligibility in addition to need and dependency. The district court declared the statute, insofar as it requires cooperation in a support action for eligibility, void and unenforceable. The court further ordered the defendants to notify individuals previously denied AFDC benefits[2] under Section 239.5 that they are now eligible and to make retroactive payments.

The defendants have appealed and seek to justify their action on the ground that only the mother's AFDC benefits, not the child's, were eliminated. The state officials

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[1] See *Doe* v. *Swank*, 332 F.Supp. 61 (N.D.Ill. 1971), aff'd sub nom., *Weaver* v. *Doe*, 404 U.S. 987; *Meyers* v. *Juras*, 327 F.Supp. 759 (D.Ore. 1971), aff'd, 404 U.S. 803; *Taylor* v. *Martin*, 330 F.Supp. 85 (N.D.Cal. 1971), aff'd sub. nom., *Carleson* v. *Taylor*, 404 U.S. 980; *Woods* v. *Miller*, 318 F.Supp. 510 (W.D.Penn. 1970); *Doe* v. *Shapiro*, 302 F.Supp. 761 (D. Conn. 1969), appeal dismissed, 396 U.S. 488 (1970). See also 45 C.F.R. § 235.70(a) (1972); Handbook of Public Assistance Administration, Part IV, § 8120.

[2] The notice was to be confined to those individuals refused aid during the two-year period immediately preceding September 1, 1972, the date of the district court decree.

also seek to invoke the Eleventh Amendment to the Constitution of the United States as granting immunity to the state from liability for retroactive benefits. We hold the quoted portion of the Iowa statute wholly unenforceable and find it unnecessary in view of the Iowa regulations to pass on the immunity question.

The AFDC provisions of the Social Security Act envision aid to strengthen the entire family unit, including the dependent child's parent, so as to encourage the care of the child within his own home. See 42 U.S.C. § 601. A procedure which directly or indirectly lessens the benefits flowing to the dependent child should not be approved. *Woods* v. *Miller*, 318 F.Supp. 510 (W.D. Penn. 1970); *Doe* v. *Harder*, 310 F.Supp. 302 (D.Conn. 1970), appeal dismissed, 399 U.S. 902; cf. *Doe* v. *Swank*, 332 F.Supp. 61 (N.D.Ill. 1971), aff'd sub nom., *Weaver* v. *Doe*, 404 U.S. 987; *Taylor* v. *Martin*, 330 F.Supp. 85 (N.D.Cal. 1971), aff'd sub nom., *Carleson* v. *Taylor*, 404 U.S. 980.[3]

The defendants urge a plea of sovereign immunity under the Eleventh Amendment. In *Rothstein* v. *Wyman*,

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[3] The state misconceives *Lavine* v. *Shirley*, 409 U.S. 1052 (1972), wherein the Supreme Court vacated the judgment of a three-judge federal district court which reached a similar conclusion as the district court here. It is contended that *Lavine* distinguishes the denial of aid to the child from denial of aid to the non-cooperative parent, condoning the latter. This is patently incorrect. In vacating the district court judgment the Supreme Court remanded the case to the district court to reconsider its decision in view of the fact that the New York social services law had been amended. In doing this the Supreme Court called attention to *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972). In *Diffenderfer* the Court observed:

> "We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered." *Id.* at 414.

The obvious thrust of the Supreme Court's decree related to the change in New York law not to any disagreement with the three-judge court decision.

The defendants also cite *Wyman* v. *James* 400 U.S. 309 (1971), upholding the denial of benefits when home visits by welfare officers are refused; however, this inappropriate analogy is convincingly discarded in *Taylor* v. *Martin*, 330 F.Supp. at 89 n. 5, aff'd sub nom., *Carleson* v. *Taylor*, 404 U.S. 980, and *Meyers* v. *Juras*, 327 F.Supp. at 762, aff'd 404 U.S. 803.

467 F.2d 226 (2 Cir. 1972), the Second Circuit ruled that retroactive payments were violations of the Eleventh Amendment, *absent* the state's consent, because they create a liability which must be met by public funds. *Id.* at 236-242. But see *Jordan* v. *Weaver*, 472 F.2d 985 (7 Cir. 1973) and *McDonald* v. *Department of Public Welfare of the State of Florida*, 430 F.2d 1268 (5 Cir. 1970).[4]

We should not decide constitutional questions unless they are imperative to our decision. Once the rights of these parties have been determined, we cannot presume that the Iowa officials will not follow their own designated procedure for awarding relief. Iowa regulations specifically provide for retroactive payments. Section 53.16(217) of the 1973 Iowa Departmental Rules governing fair hearings for public assistance programs reads in part:

> "When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, corrective payments, retroactive to the date of the incorrect action, *shall* be made." (Emphasis ours.)

The Iowa Department of Social Welfare Employees' Manual on Appeals and Fair Hearings, VI-13-2, states:

> "When, as a result of complaint by an applicant or recipient, the county department determines that policy was misapplied in his case, or that a decision, action or payment was in error, corrective action shall be taken immediately. If assistance has been underpaid, the *corrective action shall include retro-*

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[4] The Fifth Circuit in *McDonald* relies on the Supreme Court's affirmance of a three-judge court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), aff'g, 270 F.Supp. 331, where retroactive relief was granted. The Supreme Court has affirmed numerous other Social Security cases awarding retroactive relief, See, e.g., *Doe* v. *Swank*, 332 F.Supp. 61 (N.D.Ill. 1971), aff'd sub nom., *Weaver* v. *Doe*, 404 U.S. 987; *Gilliard* v. *Craig*, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); *Grubb* v. *Sterrett*, 315 F.Supp. 990 (N.D. Ind. 1970), aff'd, 400 U.S. 922; cf. *Rivera* v. *Dunn*, 329 F.Supp. 554 (D. Conn. 1971), aff'd, 404 U.S. 1054 (1972). The issue of retroactive relief has definitely been raised before the Supreme Court. See discussion in *Jordan* v. *Weaver*, supra at 989-990. See also *Alexander* v. *Weaver*, 345 F. Supp. 666 (N.D.Ill. 1972). Cf. 45 C.F.R. § 205.10(b) (2) (1972).

active payments to the date of the incorrect action. However, this shall not in any way abridge the right of the individual to appeal the erroneous action and have a hearing before a representative of the Department of Social Services if he so desires." (Emphasis ours.)

We can only assume that the defendants will follow their own regulations and retroactive payments will be made.[5] See *Grubb* v. *Sterrett*, 315 F.Supp. 990, 995-996 (N.D.Ind. 1970), aff'd, 400 U.S. 922; cf. *Francis* v. *Davidson*, 340 F. Supp. 351, 371 (D.Md. 1972), aff'd, 409 U.S. 904.

That portion of the district court's judgment relating to sovereign immunity is vacated, since we find it was unnecessary to decide; the judgment holding the last paragraph of Section 239.5 of the Iowa Code unenforceable and requiring defendants to send a notice of eligibility to those previously denied benefits is otherwise affirmed.

ADDENDUM

After this case was submitted the Iowa Commissioner called our attention to the new proposed federal regulation which makes clear that AFDC payments may not be denied to the child but may be denied to the uncooperative caretaker relative. 37 Fed.Reg. 27637. This regulation is to take effect on July 2, 1973. It obviously has prospective effects only. We need make no comment here as to its validity vel non.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[5] In Iowa all agency regulations must be scrutinized by the attorney general, a bipartisan legislative departmental rules review committee, and the appropriate committees of the legislature dealing with the subject matter. See Iowa Code Ann. ch. 17A (1972).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

72-1605 September Term, 1972

Jane Doe, Individually and on behalf of her minor child, Jennifer, and on behalf of all others similarly situated,

Appellees,

vs.

James N. Gillman, Commissioner, State of Iowa Department of Social Services, and Alma C. Edwards, Director of Clayton County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Northern District of Iowa

On motion of counsel for appellants and for good cause shown it is now here ordered:

1) The mandate of this court previously issued on July 23, 1973, is hereby recalled. By copy of this order the clerk of the United States District Court for the Northern District of Iowa is directed to return the mandate to the clerk of this court.

2) The issuance of our mandate is hereby stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the clerk of this court a certificate of

the clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 8, 1973

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

DIVISION I

Title 42 U.S.C. § 602(a)(17)(A)(i):

> "Sec. 602.(a) A State plan, for aid and services to needy families with children must...(17) provide--
>
> "(A) for the development and implementation of a program under which the State agency will undertake--
>
> "(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him,..."

Section 239.5, Code of Iowa, 1973:

> "***
>
> "No payment for aid to dependent children shall be made unless and until the county board of social welfare, with the advise of the county attorney shall certify that the parent receiving the aid for the children is cooperating in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

Attorney General's Opinion, August 5, 1957, Vol. 1958, p. 319 at p. 322:

> "***
>
> "It should be noted, however, that termination of the assistance grant does not provide for the subsistence needs of a child found in such circumstances. To carry out the intent of the law, it is presumed that the County Board might find it desirable to arrange to have the assistance grant for the benefit of the child paid to a guardian as defined under the provisions of Section 239.5, as amended by Section 4, Chapter 6, Acts of the 56th G.A., and Section 239.1(4), Code of Iowa, 1954, instead of to the child's parent."

Title 45 C.F.R. § 233.90(4):

> "(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist:
>
> "(i) in the establishment of paternity of a child born out of wedlock; or
>
> "(ii) in seeking support from a person having a legal duty to support the child; but neither this nor any other provision of these regulations should be construed to require that provisions be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker."

DIVISION II

Eleventh Amendment to the Unites States Constitution:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

Section 53.16(217, 1973 I.D.R., p. 1026, governing fair hearings for public assistance programs pursuant to Chapter 17A, Code of Iowa, 1973:

> "When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, corrective payments, retroactive to the date of the incorrect action, shall be made."

Iowa Department of Social Welfare Employees' Manual on Appeals and Fair Hearings, VI-13-2:

> "When, as a result of complaint by an applicant or recipient, the county department determines that policy was misapplied in his case, or that a decision, action or payment was in error, corrective action shall be taken immediately. If assistance has been underpaid, the corrective action shall

include retroactive payments to the date of the incorrect action. However, this shall not in any way abridge the right of the individual to appeal the erroneous action and have a hearing before a representative of the Department of Social Services if he so desires."

Section 17A.11, Code of Iowa, 1973, "Rule of Construction":

"...any action or inaction by the departmental rules review committee on any rule, or any inaction by the general assembly on any rule, shall not be construed as approval or enactment of any rule by the general assembly."

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
NO.

KEVIN BURNS, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and
ALVA C. EDWARD, Director of Clayton County Department of Social Services,
Petitioners,

v.

JANE DOE, Individually and on behalf of her minor child, JENNIFER, and on behalf of all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lorna Lawhead Williams, Special Assistant Attorney General of Iowa, hereby certify that on this 31st day of August, 1973, three copies of the Petition For A Writ Of Certiorari were mailed, postage prepaid, to David H. Correll, 708 First National Building, Waterloo, Iowa, 50703, Counsel for the Respondents. I further certify that all parties required to be served have been served.

/s/ Lorna Lawhead Williams

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Counsel for Petitioners

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Supreme Court, U. S.
FILED
NOV 16 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-406

KEVIN BURNS, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and ALVA C. EDWARDS, Director of Clayton County Department of Social Services,

Petitioners,

v.

JANE DOE, Individually and on behalf of her minor child, JENNIFER, and on behalf of all others similarly situated,

Respondents.

JOINDER OF OTHER STATES IN PETITION FOR WRIT OF CERTIORARI —AND— PETITIONERS' REPLY BRIEF

RICHARD C. TURNER
Attorney General of
the State of Iowa
LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
of the State of Iowa
State Capitol
Des Moines, Iowa 50319

ATTORNEYS FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-406

KEVIN BURNS, Commissioner [successor to James N. Gillman], State of Iowa, Department of Social Services, and ALVA C. EDWARDS, Director of Clayton County Department of Social Services,

Petitioners,

v.

JANE DOE, Individually and on behalf of her minor child, JENNIFER, and on behalf of all others similarly situated,

Respondents.

JOINDER OF OTHER STATES IN PETITION FOR WRIT OF CERTIORARI —AND— PETITIONERS' REPLY BRIEF

JOINDER OF OTHER STATES ON BEHALF OF IOWA'S POSITION

The following states have requested that we make known to the Court that they join in Iowa's position in its Petition for Writ of Certiorari, to-wit:

STATE OF ARIZONA, by Gary K. Nelson, Attorney General

STATE OF CALIFORNIA, by Evelle J. Younger, Attorney General

STATE OF ILLINOIS, by William J. Scott, Attorney General

STATE OF NEBRASKA, by Clarence A. H. Meyer, Attorney General

STATE OF NEW MEXICO, by David L. Norvell, Attorney General

PETITIONERS' REPLY BRIEF

Respondents point up the fact in their Brief that this Court has never squarely met and answered the question here raised, especially in light of HEW's recent administrative interpretation published in Volume 37, Federal Register, page 27637 on December 19, 1972 [45 C.F.R. 233.90(b) (4)].

In addition, their brief brings out the fact that the unanswered question is timely presented.

[Since filing this Petition for Writ of Certiorari on September 4, 1973, two District Courts within the same Circuit reached conflicting results in viewing a State statute which, although each statute had a different approach, concerned the problem presented here. *(Shirley v. Lavine,* No. 72-cv-163, N.D. N.Y., decision filed September 26, 1973; and *Doe v. Norton,* No. 15,579, U.S.D.C. Conn., decision filed September 5, 1973.)]

Although there may be others, the States of Oklahoma and Virginia have already implemented the HEW regulation which the Court of Appeals states "makes clear that AFDC payments may not be denied to the child but may be denied to the uncooperative caretaker relative."

However, the Court of Appeals in this matter expressly declined to pass upon the validity of the HEW regulation saying in its ADDENDUM "this regulation . . . obviously has prospective effect only. We need make no comment here as to its validity vel non", thus leaving Iowa, by reason of this decision, and other states which have, or are contemplating implementing the regulation, to face potential litigation which could be resolved were the question settled here.

Unquestionably, sooner or later this Court will be asked again to take jurisdiction of this question, and if it could be determined at this time, it would be most helpful to all the States in the performance of the difficult task of administering the AFDC program.[1]

Respectfully submitted,

RICHARD C. TURNER
Attorney General of
the State of Iowa

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General

ATTORNEYS FOR PETITIONERS

November 14, 1973

[1]Upon remand, a three-judge panel in *Shirley v. Lavine*, (No. 72-CV-163, N.D. N.Y.), dealt at length with the HEW regulation in a decision filed September 26, 1973.